EXHIBIT K

BEFORE THE BOARD OF OIL, GAS & MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

SOUTHERN UTAH WILDERNESS ALLIANCE,

Petitioner/Appellant,

vs.

DIVISION OF OIL, GAS & MINING, DEPARTMENT OF NATURAL RESOURCES, STATE OF UTAH,

Respondent/Appellee,

UTAHAMERICAN ENERGY, INC.,

Intervenor-Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Docket No. 2001-027

Cause No. C/007/013-SR98(1)

This matter came for hearing before the Utah Board of Oil, Gas and Mining (the "Board") at their regularly scheduled hearing on Tuesday, December 4, 2001, at the hour of 8:30 a.m. in Salt Lake City, Utah. The following Board members were present and participated at the hearing:

Elise L. Erler, Chairman
Robert J. Bayer
Stephanie Cartwright
Douglas E. Johnson
W. Allan Mashburn
J. James Peacock

Board Member Kent Peterson recused himself from this matter.

David A. Churchill, Esq. and Kathy C. Weinberg, Esq. with the law firm of Jenner & Block appeared on behalf of Petitioner/Appellant, Southern Utah Wilderness Alliance ("SUWA"). Also appearing on behalf of SUWA was W. Herbert McHarg, Esq.

Justin J. Quigley, Esq., Special Assistant Attorney General, and John B. Maycock, Esq., Assistant Attorney General, appeared on behalf of Respondent/Appellee, Division of Oil, Gas and Mining, Department of Natural Resources, State of Utah ("Division").

Denise A. Dragoo, Esq. and Wade R. Budge, Esq. with the law firm of Snell & Wilmer appeared on behalf of Intervenor-Respondent UtahAmerican Energy, Inc. ("UEI").

The Board, having considered the evidence and the argument presented at the hearing, being fully advised, and for good cause appearing, hereby enters the following Findings, Conclusions and Order:

PROCEDURAL MATTERS

On September 4, 2001, the Petitioner, Southern Utah Wilderness Alliance ("SUWA"), filed a Request for Agency Action with this Board appealing the July 27, 2001 decision of the Division of Oil, Gas and Mining ("Division") permitting surface coal mining operations in Lila Canyon Coal Mine Project (PAP 4007/0013-SR98(1)) and requested a hearing on the reasons for the decision pursuant to § 40-10-14(3), Utah Code Ann. Intervenor and permit applicant, UtahAmerican Energy, Inc. ("UEI"), was granted leave to intervene as a full party. Beginning on December 4, 2001, the Board conducted a hearing on the merits pursuant to § 40-10-6.7(2), Utah Code Ann., reserving its ruling on several procedural and evidentiary matters. The Board now enters these Findings of Fact, Conclusions of Law and Order regarding the following procedural matters.

The Board, in ruling on these matters, has been guided by § 40-10-30(3), Utah Code Ann., which sets forth the standard of review of its orders by the Utah Supreme Court. Specifically this Board, with certain exceptions set forth below, limited its review of the Division's permitting action to facts as contained in the administrative record as certified by the Division prior to the time of this hearing. The Board has reviewed the Division's permitting decision to ensure compliance with the statutory and regulatory requirements set forth in the Utah Coal Act, § 40-10-1, et seq.

Based upon both Utah case law and federal regulations, Petitioner bears the burden of proof on a review of the Division's decision to issue the permit in this case. *See* Harken Southwest Corp. v. Board of Oil, Gas and Mining, 920 P.2d 1176, 1182 (Utah 1996) and 30 CFR § 775.11(b)(5).

This Board has reviewed this matter as an appellate body and not as an original finder of fact in a trial *de novo* and has applied the same guidelines as the Utah Supreme Court would on review of this Board's decision. That is, the Division's administrative decision to permit will be set aside only if it is found to be:

(a) "unreasonable, unjust, arbitrary, capricious, or an abuse of discretion;
(b) contrary to constitutional right, power, privilege or immunity;
(c) in excess of statutory jurisdiction, authority or limitation;
(d) not in compliance with procedures required by law;
(e) based upon a clearly erroneous interpretation or application of the law; or
(f) as to an adjudicative proceeding, unsupported by substantial evidence on the record."

§ 40-10-30(3), Utah Code Ann.

DISCOVERY REQUESTS

Because this matter is limited to review of the record, discovery will generally be limited, except for good cause.

Petitioner's last Request for Discovery of Documents was undated but received by the Board on November 8, 2001, and was responded to by the Division, on November 13, 2001, in which the Division generally objected to the Request for Discovery but provided the requested documents. Therefore, the need for this Board to rule on this matter is obviated. SUWA has claimed no prejudice by failure of the Board to enter an Order requiring the documents which have been produced, to be produced.

By undated request received by the Board on November 8, 2001, SUWA sought a privilege log from the Division identifying each and every document for which the Division claimed a privilege and which would have otherwise been included in the administrative record certified by the Division or otherwise made publically available. The Division opposed the Request for Privilege Log. At the time of hearing and prior to beginning the presentation of its case, SUWA indicated on the record its ability to proceed with its case in the absence of a ruling on this matter and sought to reserve its right to renew the Request for Privilege Log at the close of the hearing if it felt it was necessary to do so. Based upon the Board's rulings on the merits, this matter of a privilege log appears moot, and therefore, the Board denies Petitioner's Request for Privilege Log.

The Division sought a Motion in Limine for Time Limitation on Oral Argument, which Motion was opposed by SUWA. The Board denies the Division's Motion in Limine for Time Limitation on Oral Argument.

Motions to Strike and Admissibility

On November 27, 2001, Petitioner filed an original and fourteen copies of their Proposed Hearing Exhibits. On November 29, 2001, the Division filed a Motion to Strike Petitioner's Proposed Hearing Exhibits on the following grounds: (1) the filing of exhibits was not timely; (2) the exhibits included declarations and documents outside the administrative record; and (3) allowing SUWA to file its exhibits at this time would be prejudicial to the Division. UEI moved to strike the Declarations of Elliott W. Lips and Dr. Ron Kass and certain documents not designated in the administrative record. The Board took the Motion to Strike under advisement as well as all motions for admissibility at the time of the hearing. The Board now enters its ruling concerning the admissibility of SUWA's proposed exhibits.

All exhibits which are part of the administrative record designated by the Division, for which bates stamps have been provided, are admitted and the Board finds that the filing of the administrative record with the Board placed the entire administrative record, including these documents, before it at the time the record was designated. References to the administrative record by SUWA exhibit numbers are for convenience. The Division or UEI can claim no prejudice from the use of the administrative record.

The Board grants the Motion to Strike Petitioner's Exhibit 1, the Declaration of Elliott W. Lips and expert report of Elliott Lips and the exhibits attached to the expert report of Elliott Lips to the extent they are made part of the Declaration. The Board also grants the Division's Motion to Strike the Declaration and Expert Report of Ron Kass. The Board bases this ruling on its prior ruling to limit this matter to the administrative record and all comments before the Division at the time it made its administrative decision to issue the permit. Neither of these declarations or

opinions were before the Division at the time it made its decision and will not be considered by the Board.

SUWA's Exhibit 17 is a directive promulgated by the Division and employed by the Division in its preparation of administrative decisions. The Division can claim no prejudice from this exhibit. Therefore, it is admitted.

SUWA's proposed Exhibit 56, which consists of one page from a U.S. Geological Survey monograph, does not appear to have been either part of the administrative record or considered by the Division in its decision to issue the permit and will therefore be denied. The same is true of Exhibit 71, selected pages of the Utah Endangered, Threatened and Sensitive Plant Field Guide. This document is not admitted.

Exhibits 78 and 90 appear to be part of the Permit Application Package, have been erroneously excluded from the administrative record and therefore are admitted.

Exhibit 79 does not appear to have been before the Division at the time it made its decision or to have been relied upon by the Division and therefore is excluded.

Exhibits 92 and 93 are documents which purport to represent the violation status of entities either owned by, controlled by, or affiliated with the UEI for purposes of determining whether a permit should have issued. Exhibit 92 purports to be a screen printout of the Applicant Violator System dated November 5, 2001. Because of the date of the printout, November 5, 2001, it is clearly not a printout that was available at the time the permit was issued and therefore is excluded. Exhibit 93, the Notice of Violation (September 11, 2000), Cessation Order and Final Civil Penalty Assessment and Demand for Payment of the Ohio Department of Natural Resources) either was or should have been available to the Division in its review of the Applicant

Violator System and is therefore admitted.

Exhibit 101, which is a printout of the Emery County Road Network contains information that appears elsewhere in the Division's record and therefore is admitted.

Exhibit 103, which consists of Emery County Maintenance Logs between 1994 and 2000, also contains information reviewed by the Division directly or indirectly in its permitting decision and therefore is admitted.

Exhibit 104, which is an Agreement dated October 19, 1999, between Emery County and UEI, is a document referred to by the Division in its permitting decision and therefore is clearly something which the Division would have considered either directly or indirectly in its permitting decision, and therefore is admitted.

Document 106 is the Application for Transportation and Utility Systems and Facilities on Federal Lands submitted to the U.S. Bureau of Land Management ("BLM") for UEI's mine facilities and road. The Division would have considered directly or indirectly in its permitting decision and therefore is admitted.

Document 107 is UEI's Roadway Encroachment Application dated December 30, 1998, and also would have been considered directly or indirectly by the Division in its permitting decision and therefore is admitted.

Document 108 is a letter from UEI to the BLM concerning the Lila Canyon Environment Assessment and the plan of development for the subject mine and road. Therefore, it is a document which was considered directly or indirectly by the Division and is admitted.

Documents 112 through 114 are letters from UEI to their contractors and/or Emery County concerning the issues decided by the Division and therefore involve matters considered

directly or indirectly by the Division in its permitting decision, and are admitted.

Documents at Exhibit 115 consist of photographs of the Lila Canyon road, which are admitted only for illustrative purposes.

On November 30, 2001, SUWA filed with the Board of Oil, Gas and Mining its Pre-Trial Memorandum. Both the Division and UEI filed Motions and Memoranda to Strike SUWA's Pre-Trial Memorandum on December 3, 2001. The Division and UEI claimed that the Memorandum should be stricken because it was untimely and that it expanded the scope of the appeal. The Board denies the Division's and UEI's Motions on the basis of expansion of scope appeal, finding that the matters raised in the Memorandum are within the scope of the original Request for Agency Action in this matter, but grants the Division's and UEI's Motions to Strike on the basis of timeliness pursuant to R641-105-100.

Based on these procedural rulings, the Board is now ready to rule on the issues presented concerning the substantive appeal.

MERITS

A. Did the Division have Before It the Required Geologic and Hydrologic Information to Meet the Requirements of § 40-10-10(2)(c), (d) and (4) and Specifically the Information Required Under the Board's Administrative Rules at R645-301-600 and -700?

The Board finds the Permit Application Package and the Division's permitting decision in this matter should be set aside and remanded because of deficiencies in this area in the following respects.

1. The administrative record lacks sufficient baseline data on acid and toxic forming materials,

§ 40-10-10(2)(d), Utah Code Ann. requires:

> A statement of the result of test borings or core samplings from the permit area, including logs of the drill holes; the thickness of the coal seam found; an analysis of the chemical properties of such coal; the sulphur content of any coal seams; chemical analysis of potentially acid or toxic forming sections of the overburden; and chemical analysis of the stratum lying immediately underneath the coal to be mined, except that the provisions of this subsection may be waived by the division with respect to the specific application by written determination that these requirements are unnecessary (emphasis added).

This Board's rules at R624.300 requires the same but limits waivers to findings concerning pyrite sulphur . As of the sixth successive Technical Analysis by the Division, the application was noted to be deficient and not approveable without this information. That is, the Division was not willing to waive these requirements. The Division's final approval of the permit application did provide a written determination in the form of a conclusion that the requirements were unnecessary because material which could be acid and toxic forming would be covered under four feet of material. However, the administrative record is devoid of any analysis as to why this determination was made and whether any data supported the determination. This is further exacerbated by the failure of the Division to explain its rational after its sixth Technical Analysis states that:

> Current information is not sufficient to assist in determining all potentially acid or toxic forming strata down to and including the stratum immediately above and below the coal seam to be mined and determining whether reclamation can be accomplished . . .
>
> It has not been established that the underground development waste that will come from construction of the tunnels can be properly disposed of at a refuse site and that reclamation of a refuse pile can be accomplished.

(AR 000470, 000535, SUWA Exhibit No. 10.)

This finding of deficiency is not answered by a later requirement of cover without an accompanying analysis that the potential for groundwater impacts have been addressed in sufficient detail to ensure compliance with the rules.

While the Board draws no conclusion as to whether the requirement could be met, the administrative record simply does not provide a factual basis or analysis for such a conclusion in the final permitting decision. This action by the Division is an abuse of discretion without substantial evidence in the record and is not in compliance with the procedures required by law. Therefore, the Division's decision to issue the permit without this required data requires remand.

2. Section 40-10-10(2)(c), Utah Code Ann. requires:

> A determination of the probable hydrological consequences of the mining and reclamation operations, both on and off the mine site with respect to the hydrologic regime, quantity and quality of water in surface and groundwater systems, including the dissolved and suspended solids under seasonal flow conditions, and the collection of sufficient data for the mine site and surrounding areas so that an assessment can be made by the Division of the probable accumulative impacts of all anticipated mining in the area upon the hydrology of the area and, particularly, upon water availability, but this determination should not be required until such time as hydrological information on the general area prior to mining is made available from an appropriate federal or state agency. The permit shall not be approved until this information is available and is incorporated into the application (emphasis added).

Specifically R645-301-722.100 requires the submittal of cross section and contour maps showing the location and extent of subsurface water "portraying [seasonal differences of head in different aquifers]". The Division consistently noted this failure as a deficiency. *(See* AR 002509, 002313, 001800, 001673, 001549, and 49-98, SUWA Exhibits 16, 60) The submittal of this data is nondiscretionary; therefore, the permit application is deficient and the Division's

permitting decision is not supportable. This action by the Division is an abuse of discretion without substantial evidence in the administrative record and is not in compliance with the procedures required by law. Therefore, the Division's decision to issue the permit without this required data requires remand.

3. R645-301-731 requires that the plan provide baseline hydrologic and geologic data for determining impacts to the hydrological balance by comparing baseline data to monitoring data. It is undisputed that there are two intermittent streams within the permit area, Lila Canyon and Little Park Wash. No baseline data have been submitted for these intermittent streams. The Division has noted consistently the deficiency in its prior Technical Analyses. (AR 001669-70, 001546, 000448, 000481; SUWA Exhibit 18.) The Division now appears to rely upon future monitoring for meeting this requirement. This action by the Division is an abuse of discretion without substantial evidence in the administrative record and is not in compliance with the procedures required by law. Therefore, the Division's decision to issue the permit without this required data requires remand.

4. R645-301-724.100 requires the submission of data on seasonal quantity and quality of groundwater in existing wells. The Division's own technical directive, Tech. 004 at 9, (SUWA Exhibit 17) requires data quarterly for a minimum of two years prior to permit issuance. The record clearly reflects that only three observations at each well were actually made and data were actually collected only twice for one well and once for all three. (AR 000551, SUWA Exhibit 29.) Nor have data for water quality and quantity in seeps and springs been provided. Instead, future monitoring has been proposed. Again, the Division has previously required that this data be provided for permit issuance and adequate data have not been provided by UEI. The issuance

of the permit, in light of the status of the administrative record and the lack of analysis for deviating from the rules or the Division's own internal guidance documents, is an abuse of discretion without substantial evidence in the administrative record and is not in compliance with the procedures required by law. Therefore, the Division's decision to issue the permit without these required data requires remand.

5. Rule 731.211 requires submittal of a groundwater monitoring plan that provides monitoring of groundwater quality. The plan, as approved, contains no required monitoring for water quality other than seeps and springs for which there are inadequate baseline data. The administrative record does not reflect any basis for this deviation from the rules concerning water quality. This action by the Division is an abuse of discretion without substantial evidence in the record and is not in compliance with the procedures required by law. Therefore, the Division's decision to issue the permit without these required data is remanded.

6. R645-301-722 requires cross sections and maps showing the location and extent of subsurface water, location and extent, both aerial and vertical, of distribution of aquifers, and portrayal of seasonal differences of head in different aquifers on cross-sections and contour maps. Both the Division and the UEI rely on Plat 7-1 of the Permit Application Package which appears to be a generalized regional geologic cross-section of the Book Cliffs region and is clearly inadequate to meet the requirements of the law. This action by the Division is an abuse of discretion without substantial evidence in the record and is not in compliance with the procedures required by law. Therefore, the Division's decision to issue the permit without these required data is remanded.

7. Rule 728.200 requires that the Probable Hydrological Consequence "PHC" document

be based on the baseline hydrologic and geologic data required elsewhere in the rules, including information on acid or toxic forming materials. For the reasons set forth above, the acceptance and findings of the PHC and Cumulative Hydrological Impact Analysis ("CHIA") constitute an abuse of discretion without substantial evidence in the record and are not in compliance with the procedures required by law. Therefore, the Division's decision to issue the permit without these required data is remanded.

8. Because the Division's CHIA is required to analyze the cumulative hydrological impacts of proposed mining on all surface and groundwater resources in "the cumulative impact area," the Division's establishment of a cumulative impact area boundary 1700 feet east of the permit area on the basis of the topographic (surface) divide, is without support in the record. Not only does it appear inconsistent with the general statements concerning groundwater in the Permit Application Package, (AR 005341, SUWA Exhibit 39) but the cumulative hydrological impact assessment itself acknowledges that the mine will intercept water from a "regional aquifer" (AR 005342, 006437, SUWA Exhibits 55 and 41). Based on the status of the administrative record, it is impossible to determine whether or not Range Creek, a drainage to the east of the permit area, should be included in the cumulative impact area. The Division has acknowledged, in prior Technical Analyses, that impacts to Range Creek were possible, which is further supported by the acknowledgment of the need for monitoring of Range Creek to determine impacts. (AR 002506, 002311, 901433 SUWA's Exhibits 27, 45, 54) Post-mining monitoring is not a basis for substitution of pre-mining baseline data collection and analysis. This action by the Division is an abuse of discretion without substantial evidence in the record and is not in compliance with the procedures required by law. Therefore, the Division's decision

to issue the permit without these required data is remanded.

9. The Division is required, before granting a permit, to make a finding of no adverse impact when mine development will exist within 100 feet of an intermittent stream. R645-301-731.610. The Division has made such a finding. However, this finding is not supported by the administrative record. In the absence of data on water quality or quantity concerning the intermittent streams in the administrative record, there is no record basis for a finding of no adverse effect. *(See* decision document Technical Analysis at 43-44, AR 000658-59, SUWA Exhibit 59.) Therefore, the Division's decision to issue a permit where mine development will exist within 100 feet of the Lila Canyon channel is an abuse of discretion, without substantial evidence in the record, and is not in compliance with the procedures required by law. Therefore, the Division's decision to issue the permit without these required data is remanded.

B. Does the Permit Comply with R645-301-300, Biology?

Although the Board will defer to the Division's expertise concerning the adequacy of data and inferences to be drawn from data submitted, the failure of the Division to make necessary findings that the data which were presented to it were reliable, and throws into question the entire Permit Application Package concerning those requirements under R645-301-300, Biology.

Fundamental to the acceptance of biological information for the issuance of a permit by the Division is adequate basis in the administrative record for reliance upon any information received. The Administrative Rules require that "[a]ll technical data submitted in the permit application will be accompanied by the names of the persons or organizations that collected and analyzed the data, the dates of collection, an analysis of the data, and descriptions of the methodology used to collect and analyze the data. . . [technical analysis will be planned by or

under the direction of a professional qualified in the subject to be analyzed]." R645-301-131 - 132. All of the grounds raised by SUWA concerning inadequacy of the biological data are matters on which experts may or may not agree. To the extent there is a basis in the administrative record for deferring to the Division's expertise or the Division's reliance upon expertise, this Board will do so. However, based upon the failure of the record to disclose the qualifications of the personnel conducting the surveys, SUWA's claims concerning the inadequacy of the biological data require that this permit be remanded to the Division such that a record may be established that would allow a reviewing board or court to determine that there is a basis for reliance upon the biological data submitted. This action by the Division is an abuse of discretion, without substantial evidence in the record, and is not in compliance with the procedures required by law. Therefore, the Division's decision to issue the permit without these required data is remanded.

C. Was the Permit Issued Improvidently?

SUWA claims that the permit in this matter has been issued improvidently because the UEI failed to update its Permit Application Package prior to the issuance of the permit with required information concerning its status on the Applicant Violator System.

Because this matter is being remanded for the matters set forth above, the Board need not address this issue, and therefore, will not rule on it.

D. Is the Decision to Process the Permit as a Significant Revision Correct?

SUWA has alleged in its Request for Agency Action that the processing of the permit in this matter as a significant revision was erroneous because R645-303-222 provides that:

> [A]ny extensions to the approved permit area, except for incidental boundary changes, must be processed and approved through application for a new permit and may not be approved under R645-303-221 through R645-303-228.

In support of this, SUWA alleges that the Lila Canyon Mine permitting action involves in excess of three times the surface area and in excess of three times the coal ownership acreage of the pre-existing Horse Canyon permit area, and that the result would be that the original Horse Canyon permit area would be expanded by a factor of four. Further, SUWA alleges that the Lila Canyon and Southern Horse Canyon tract boundaries are not completely contiguous and involve significant new surface facilities. Neither the Division nor the UEI contest the conclusions of SUWA regarding this legal requirement. Rather, the sole response of the Division and UEI is that processing the permit as a significant revision constituted harmless error because only the name of the document would have changed. Therefore, given that this matter is being remanded to require compliance in the areas referenced above, and the absence of any argument that SUWA is wrong in its interpretation of R645-303-222, the Division is directed to process the permit as a new permit. Since data still must be acquired to satisfy the applicable law and regulations and the position of the Division and UEI is that the requirements are the same for both a significant revision and a new permit, the Board requires compliance with its rules.

E. Wilderness and Post-Mining Land Use

SUWA claims that the post-mining land use and reclamation requirements under the Utah Coal Act require that the wilderness characteristics of the lands be the criteria for determining reclamation success.

R645-301-411.130 requires that a permit application include "a description of existing land uses and land use classifications" and a plan to insure that post-mining land use will be restored to "[t]he uses they were capable of supporting before any mining; or [h]igher or better uses." (R645-301-4123.100, - .120) Wilderness designation is a federal responsibility entrusted to Congress on lands which are managed by, in this case, the BLM. The Division has considered the BLM's 1993 Environmental Assessment of the Turtle Canyon Wilderness Study Area (SUWA Exhibit 80) and the Solicitor's Memorandum dated April 18, 1999 (AR 000905), and concluded that it is the position of the federal government (the land owner) that the federal lands subject to this permit do not require a change in management from current land management plans. The BLM has concluded that underground coal mining activities are consistent with existing land use classifications under the Price River Resource Management Plan. The administrative record is more than adequate to demonstrate the Division's correspondence with the BLM considered post-mining land use and the characterization and uses of that land by the land management agency responsible for the land. *(See* AR 004927, 004919, 004943, 004944 and 004936.) Specifically, the Division could reasonably rely upon the BLM's conclusion that "[n]aturalness, opportunities for solitude and primitive/unconfined recreation and cumulative values would not be diminished nor degraded by the proposed underground mining due to substantial cover anticipated (at least 1500 feet)." *(See* AR 000958.) SUWA's challenge is not sufficient and fails.

F. Is the Mine Access Road Within the "Affected Area" and thus Subject to Permitting?

SUWA has challenged the Division's permitting decision to exclude the new road as being within the definition of "affected area."

The road proposed to be constructed for access to and from the permit area is referred to herein as the Lila Canyon Road. Emery County lists this road as County Road 126. (AR 000185)

The parties are in agreement that for purposes of determining whether the Lila Canyon Road should be included within the "affected area" for purposes of permitting, the question may be resolved by applying two sources of authority. First is the Utah statutory definition of "Surface Coal Mining Operations". § 40-10-3, Utah Code Ann. which provides:

> "Surface coal mining operations" mean:
>
> (a) Activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of Section 40-10-18, surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commence. These activities include excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site; but these activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 2/3% of the tonnage of minerals removed for purposes of commercial use or sale or coal explorations subject to Section 40-10-8.
>
> (b) The areas upon which the activities occur or where the activities disturb the natural land surface. These areas shall also include any adjacent land the use of which is incidental to the activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of the activities and for haulage and excavation, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas, and other areas upon which are sited structures, facilities, or other property or materials on the surface resulting from or incident to the activities.

Because of long standing contention between state and federal authorities regarding rulemaking by the U.S. Office of Surface Mining ("OSM") concerning the definition of "surface coal mining operations" as applied to roads, the Division and the OSM settled litigation over federal rulemaking and federal oversight enforcement actions by means of a letter of understanding dated July 3, 1995, prepared by then Division Director James Carter. The second source of authority, known as the Carter letter (SUWA Exhibit 109), was relied on both by the Division in formulating its permitting decision, and then by SUWA in challenging that decision. Applying the criteria found in the Carter letter to the Division's finding, the Board rules as follows:

1. Was the road constructed, reconstructed or used exclusively for coal mining and reclamation activities; i.e., a multiple use, open access public road?

The Division, in making the finding that the road was not exclusively a coal mining and reclamation road, relied upon communication from Emery County dated February 27, 2001 (SUWA Exhibit 110). The Record of Decision by the BLM in issuing its Environmental Assessment, *(See* AR 000282), the Agreement between Emery County and UtahAmerican Energy, Inc. of October 19, 1999 *(See* AR 000282), and its interpretation of the Utah Coal Mining Rules (*See* AR 000282). The Division's decision that the road is a multiple use, open access public road is reasonable and supported by substantial evidence in the administrative record.

2. Was the road acquired by a governmental entity and not deeded to avoid regulation?

The Division's findings and analysis at AR 000283 are reasonable and supported by substantial evidence in the record.

3. Is the road maintained with public funds or in exchange for taxes or fees?

The Division's findings and analysis at AR 000284 are reasonable and supported by

substantial evidence in the record.

4. Was the road constructed in a manner similar to other public roads of the same classification?

The Division's findings and analysis at AR 000285 are reasonable and supported by substantial evidence in the record.

5. Are the impacts from mining on the road insignificant under Utah's definition of "affected area" and "surface coal mining operations"?

The Division's findings and analysis at AR 000285 are reasonable and supported by substantial evidence in the record.

In conclusion, the majority of the Board rejects SUWA's challenge to the Division's permitting decision to exclude the Lila Canyon County Road 126 from State Highway 6 to the disturbed area boundary of the proposed Lila Canyon mine.

ORDER

Therefore, based on the record before the Board, the Division's decision to issue the permit of July 27, 2001 is reversed and the permit is denied.

This matter is remanded to the Division for further action consistent with this Order.

Notice re Right to Seek Judicial Review by the Utah Supreme Court or to Request Board Reconsideration: As required by Utah Code Ann. § 63-46b-10(e) - 10(g), the Board hereby notifies all parties in interest that they have the right to seek judicial review of this final Board Order in this formal adjudication by filing a timely appeal with the Utah Supreme Court within 30 days after the date that this Order is issued. (Utah Code Ann. § 63-46b-14(3)(a) and -16) As an alternative to seeking immediate judicial review, and not as a prerequisite to seeking judicial review, the Board also hereby notifies parties that they may elect to request that the Board

reconsider this Order, which constitutes a final agency action of the Board. Utah Code Ann. § 63-46b-13, entitled, "Agency Review - Reconsideration," states:

> (1)(a) Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section 63-46b-12 is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested.
> (b) Unless otherwise provided by statute, the filing of the request is not a prerequisite for seeking judicial review of the order.
> (2) The request for reconsideration shall be filed with the agency and one copy shall be sent by mail to each party by the person making the request.
> (3)(a) The agency head, or a person designated for that purpose, shall issue a written order granting the request or denying the request.
> (b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied.

Id. The Board also hereby notifies the parties that Utah Admininstrative Code R641-110-100, which is part of a group of Board rules entitled, "Rehearing and Modification of Existing Orders," states:

> Any person affected by a final order or decision of the Board may file a petition for rehearing. Unless otherwise provided, a petition for rehearing must be filed no later than the 10th day of the month following the date of signing of the final order or decision for which the rehearing is sought. A copy of such petition will be served on each other party to the proceeding no later than the 15th day of that month.

Id. See Utah Administrative Code R641-110-200 for the required contents of a Petition for Rehearing. If there is any conflict between the deadline in Utah Code Ann. § 63-46b-13 and the deadline in Utah Administrative Code R641-110-100 for moving to rehear this matter, the Board hereby rules that the later of the two deadlines shall be available to any party moving to rehear

this matter. If the Board later denies a timely petition for rehearing, the party may still seek judicial review of the Order by perfecting a timely appeal with the Utah Supreme Court within 30 days thereafter.

The Board retains continuing jurisdiction over all the parties and over the subject matter of this Cause, except to the extent said jurisdiction may be divested by the filing of a timely appeal to seek judicial review of this Order by the Utah Supreme Court.

For all purposes, the Board members' signatures on a faxed copy of this Order shall be deemed the equivalent of a signed original.

ISSUED this 14th day of December, 2001.

Robert J. Bayer, Board Member

Douglas E. Johnson, Board Member

W. Allan Mashburn, Board Member

J. James Peacock, Board Member

MINORITY OPINION

Chairman, Elise L. Erler, and Board Member, Stephanie Cartwright, concur with the

this matter. If the Board later denies a timely petition for rehearing, the party may still seek judicial review of the Order by perfecting a timely appeal with the Utah Supreme Court within 30 days thereafter.

The Board retains continuing jurisdiction over all the parties and over the subject matter of this Cause, except to the extent said jurisdiction may be divested by the filing of a timely appeal to seek judicial review of this Order by the Utah Supreme Court.

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Board's decision that the Division's approval of the permit challenged herein should be remanded for further data and analysis as set forth above. However, we would also remand as to the final issue of permitting of the road.

We find that the proposed reconstruction of the road from the mine site to Highway 6 should be included as "affected area" under the definition of "surface coal mining operations". The existing Emery County Road 126 effectively ceases to exist as a road after the 2.6 mile section presently listed by the County in its road log. There is no evidence of maintenance by the County of this lower section or the remaining route to the proposed mine. The present alignment and condition cannot sustain the intensity of traffic for the proposed mining operation. This road needs realignment and engineered design, new right-of-way permits from the BLM; essentially, new construction of a substantial paved road capable of safely handling the heavy traffic associated with an active coal mine shipping its coal by truck.

The Division is required to include within the "affected area" "every road used for purposes of access to or for hauling coal to or from coal mining operations" unless the road is found exempt. Although there is controversy over which public roads should be excluded, all agree there is not a blanket exemption. To fill the void when SMCRA's criteria were invalidated, Utah adopted, with eventual OSM concurrence, criteria for the exemption analysis. These are specified in Mr. Carter's letter of July 3, 1995 and include: a) if ownership was properly acquired by the governmental entity (not deeded to avoid regulation); b) if the road is maintained with public funds or in exchange for taxes or fees; c) if the road was constructed in a manner similar to other public roads of the same classification; and d) if impacts from mining are significant. The Division and the Board further recognize that creative arrangements by local

governments increasingly require mining operations to maintain, construct, or fund improvements, and complicate the Division's analysis.

The Division agreed with OSM to make the exemption determination on a case by case basis, after reviewing the underlying facts and criteria. In this case, where the necessary road improvements do not exist, we believe construction of the necessary substantial road improvements should be linked to the mining permit as "affected area" under the definition of "surface coal mining operation."

UEI's proposed mining operation is the proximate cause for the necessary - essentially new - road to the mine site. Notwithstanding its desire to increase access into a remote area, Emery County has no independent intention, funding or plan to upgrade the road, "but for" UEI's mining project. Emery County also has no independent intention, funding or plan to extend proposed road improvements to the mine site without the funds provided by UEI. Although Emery County's letter of February 27, 2001 (AR 000211) creates the appearance of a governmental entity ready to accept independent financial and supervisory responsibility for immediate construction, its responsibility claimed for the road is illusory. Here the Division knew that UEI, as agent for Emery County, had agreed to bear all out-of-pocket expenses without expectation of reimbursement, for all of Emery County's actions regarding the road, including document preparation and negotiations, the BLM Right of Way application, and design and engineering costs for planning the road's proposed improvements. Moreover, UEI has budgeted and realistically expects to bear, directly or indirectly, the costs of road construction and maintenance. (AR 000784)

While Emery County may wish to see the road improved to increase access and stimulate development, the County has no independent plans to fund such construction from taxation of its residents. There is no reason to believe or find that Emery County has scheduled the road construction project into its County capital improvement budget or plan. Significantly, Emery County has no obligation to the Division or UEI to proceed with construction until and unless UEI escrows funds and approves construction. Its only obligation is to maintain the road it has built, which will only occur if UEI funds the road. We believe the County road fails the primary criteria for exemption from permitting. The road is being constructed or reconstructed exclusively for coal mining and reclamation activities. The rights of way are assigned to the County to avoid permitting; there is no funding but for UEI, and it is being upgraded far beyond what existing multiple use demands would justify.

Additionally, we are not persuaded the Division followed its own criteria by analyzing the impact of mining upon the road. There is no supporting study. There are bald conclusions of no impact that ignore the potential impact of the necessary construction and defer further review and analysis to future study. We believe the Division basically ended its analysis upon receipt of Emery County's letter of February 27, 2001, and has not satisfied the requirement of examining the impacts on the land from road construction.

Mr. Carter's letter acknowledged that mere vesting of title to a road in a public entity does not justify exemption. We agree. The unconditional exemption is not supported in the administrative record or the law and allows an untenable result of permitting a mine without the

obligation of any one to fund or build the necessary access road improvements.

ISSUED this 14th day of December, 2001.

Elise L. Erler, Board Chairman

Stephanie Cartwright, Board Member

obligation of any one to fund or build the necessary access road improvements.

ISSUED this 14th day of December, 2001.

Elise L. Erler, Board Chairman

Stephanie Cartwright, Board Member

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing **Findings of Fact, Conclusions of Law and Order** to be mailed by first class mail, postage prepaid, on this 17th day of December, 2001, to the following:

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